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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No.

MABEL WHAYNE,

Petitioner,

v.

M. V. SHUTTLER, INC.

AND

LEA RIVER LINES, INC.

AND

TRANSPORTATION MANAGEMENT SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Mabel Whayne, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on June 19, 1968.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. A, *infra*, p. 17) is reported at — F. 2d —. The opinion of the Trial Court (App. B, *infra*. pp. 19-27) is reported at 252 F. Supp. 573 (E. D. Pa. 1966).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 19, 1968. The jurisdiction of this Court is invoked under U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

1. Where service is made upon an individual who discloses her position, but refuses to identify herself by name, and the individual holding that position is in fact an officer of the defendants, did not the Court err in vacating service on those defendants?

2. Where all of the defendants are present and doing business in the jurisdiction and at the same address and interrelated in ownership and activity and one of the defendants is served as an agent of the other two, did not the Court err in vacating service on those two defendants?

3. Where all the Defendants are present and doing business in the jurisdiction and at the same address and are found by the Court as Finder of the Fact as tentacles of the same complex and such relationship is crucial for the determination of proper service, did not the Court err in precluding discovery as to the complex and the relationships?

STATEMENT OF THE CASE.

This is a consolidated civil action and action in admiralty, arising out of a complaint in libel filed by the plaintiff-libellant on January 30, 1959 against M. V. Shuttler, Inc.; Lea River Lines, Inc. and Transportation Management Service, Inc.

All these corporations are Delaware corporations. M. V. Shuttler, Inc., and Lea River Lines, Inc., had an ostensible office in Wilmington, Delaware, which was admitted by all concerned to be a corporate service office devoid of any employees (101a, 80a).

The complaints and libels were served upon all defendants[1] at the office of Transportation Management Service, Inc., at 1813 Ranstead Street, Philadelphia, Pennsylvania. The return of service by the marshal indicates that the summons with the complaint was delivered to a woman in charge of the office of Transportation Management Service, Inc., the said woman refusing to give her name or title (10a, 12a).

Counsel for Transportation Management Service, Inc., filed an answer denying ownership and control of M. V. Shuttler, Inc., and at the same time filing a special appearance and a motion to vacate service as to M. V. Shuttler, Inc., and Lea River Lines, Inc. (16a, 17a). The motion to vacate service alleges falsely that the defendants, M. V. Shuttler, Inc., and Lea River Lines, Inc., have no office, *officer* or place of business within this jurisdiction (17a). In fact, both M. V. Shuttler, Inc., and Lea River Lines, Inc., had officers, whose place of business was at 1813 Ranstead Street, Philadelphia, Pennsylvania (94a, 76a, 77a, 78a, 174a).

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1. This brief will be cast in the framework of a plaintiff v. defendant posture. As for the admiralty action, the same principles would apply and would read libellant v. respondent.

Depositions were then taken of E. W. Graver, president of Transportation Management Service, Inc., Felicia L. Bandos, secretary and treasurer of Transportation Management Service, Inc., and also secretary of M. V. Shuttler, Inc., and also assistant treasurer of Lea River Lines, Inc. (94a, 174a). The deposition of Thomas L. Pepper, Jr., who was vice-president of Transportation Management Service, Inc., and Lea River Lines, Inc., was taken also. The depositions indicated that M. V. Shuttler, Inc., hauled exclusively for Lea River Lines, Inc., and Indian River Lines, Inc. (57a). Indian River Lines, Inc., was a parallel corporation to Lea River Lines, Inc., with the same board of directors and same officers (166a). A protective order issued by the court prevented any discovery into the financial interest of C. S. Leaman and after his death, the Leaman estate. Ultimately, at trial, it was shown that Lea River Lines, Inc., Indian River Lines, Inc., and Transportation Management Service, Inc., were controlled by the executor and trustee of the estate of C. S. Leaman.[2] At the deposition of Miss Bandos, she testified that she was the individual in charge of the office of Transportation Management Service, Inc. (90a, 110a).

Judge Hastie, specially designated to hear motions in the United States District Court, heard argument on the motion to vacate service and did vacate service as to M. V. Shuttler, Inc., and Lea River Lines, Inc. This order was appealed from in the appeal in the Court below.

The case then came before the Honorable Francis L. Van Dusen, J. on December 3, 1965, and tried through December 10, 1965. Because of the evasive action of employees of the defendants to avoid service of subpoenas, it was necessary to take posttrial depositions which were filed as part of plaintiff's case (326a). At the end of

2. The trial court recognized the extent of the complex in footnote 29 of its opinion (411a and App. B, p. 26).

plaintiff's case, defendant, Transportation Management Service, Inc., filed a motion to dismiss on the basis that in fact and in law, no responsibility on the part of that defendant had been shown. In accordance with a pretrial order, the trial had proceeded first on the issue of the operation, management and control of the activities of the M. V. Shuttler, Inc., by Transportation Management Service, Inc. (135a). On the basis of the evidence adduced at trial and the depositions subsequently filed by order of the court, the court granted defendant's motion to dismiss and the action was dismissed with prejudice on February 11, 1966. Appeal was then timely taken from this judgment to the court below.

Plaintiff was a cook aboard the vessel, the M. V. "Shuttler", which provides the motor power for rafts of barges. Her son had previously been a member of the crew of the M. V. "Shuttler", having been hired by a Capt. John Fuller. Plaintiff had been advised that all personnel aboard the M.V. "Shuttler" were hired by Capt. John Fuller. She herself was hired by Capt. Fuller (273a, 274a).

Plaintiff served aboard the M. V. "Shuttler" as a relief cook from August, 1956, to January, 1957, and was called back when the Captain's wife left the vessel in March, 1957, again as a cook. She was told by the Master that the vessel was owned by Lea Rivers Line, Inc. (289a). She was told by the Captain of the M. V. "Shuttler" that John Fetsko was the port engineer (291a). When one of her payroll checks was lost, she was told that it would have to be replaced by Lea River Lines, Inc. in Philadelphia (290a).

While plaintiff was working as a cook on the M. V. "Shuttler" on April 19, 1957, the vessel was in a collision with a coal barge. Plaintiff was knocked to the floor injuring her coccyx. She was told by the Captain that the radar

aboard the vessel had not been working. At the time of the collision, the vessel was underway during a thick fog.

The M. V. "Shuttler" was built without any risk capital, the entire cost being borne by the shipbuilding company and a bank for a newly formed corporation, M. V. Shuttler, Inc. which consisted of a Board of Directors of John Fetsko, his wife, and Felicia Bandos, a long-term employee and officer of Transportation Management Service, Inc. The entire project was conceived by C. S. Leaman before his death (184a).

After the death of C. S. Leaman, C. E. Fernald, who had been intimately connected with the Leaman interest, became the executor and trustee of the estate. The arrangements for the ship to be built without risk capital was arranged by Rae Eastwood, an alter-ego of C. E. Fernald (250a).

The M. V. "Shuttler" was used exclusively by the Leaman interest towing barges for Indian River Lines, Inc. or Lea River Lines, Inc., except for one occasion when it towed for Ashland Oil Company which was in accordance with a contract between Lea River Lines, Inc. and Ashland Oil Company (182a, 183a).

The reason M. V. Shuttler, Inc. was formed to be the ostensible owner of the M. V. "Shuttler", was to thwart unionization of the employees of the Leaman interests (252a). M. V. "Shuttler" is only one example of the one-vessel corporations organized in this manner to provide the motor power for barges owned and operated by Lea River Lines, Inc. and Indian River Lines, Inc. (252a. 253a). The securing of business for the M. V. "Shuttler" was done by Lea River Lines, Inc., and Transportation Management Service, Inc., as directed from the office of Transportation Management Service, Inc. (66a, 67a).

The testimony indicates the complete domination of the Leaman interest of all the tentacles. This could not be

adduced until trial because of a protective order which forbade discovery in this area. Transportation Management Service, Inc., became a corporation in 1945. For the period covering the date of the accident to the time of service, the paper officers, owners, and directors showed a complete lack of knowledge of all the fundamental corporate facts of life, and with activities which belie true separate identity. This is shown by the shuffling of officers and directors and the granting and shucking off of titles (153a, 154a, 156a, 157a, 159a, 162a, 166a, 173a, 174a, 184a, 185a, 186a, 187a, 190a, 191a, 196a, 198a, 199a, 200a, 243a, 247a, 248a, 254a, 255a, 348a, 350a, 352a, 353a, 354a, 356a, 365a, 370a, 371a, 384a).

REASONS FOR GRANTING THE WRIT.

A. The Opinion of the Court Below by Its Requirement of Rigid Formalism Is Contra to a Spirit of Pragmatic Application of the Federal Rules of Civil Procedure.

I.

Service was properly effectuated on M. V. Shuttler, Inc. and Lea River Lines, Inc. by service on an officer of the named corporations. Federal Rules of Civil Procedure 4(d-3) and 4(d-7) set forth the mode by which a corporation is served by a summons and a complaint.

> Rule 4(d)(3) "Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Rule 4(d)(7) "Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. As amended Jan. 21, 1963, eff. July 1, 1963."

Section 4(d)(7) is inapplicable and warrants no discussion in this brief. Service was properly made under

Section 4(d)(3) on M. V. Shuttler, Inc., and Lea River Lines, Inc., both by the actual fact of service upon an officer of those corporations and by virtue of service upon Transportation Management Service, Inc., as agent for M. V. Shuttler, Inc., and Lea River Lines, Inc.

The return of service of the marshal clearly indicates that service was made upon a woman who identified herself as being in charge of the office of Transportation Management Service, Inc., but did not give her name or other titles. Subsequent discovery conclusively indicated that the woman in charge of the office of Transportation Management Service, Inc., was Felicia L. Bandos. At the time of the service Felicia L. Bandos was secretary and treasurer of Transportation Management Service, Inc. She was also assistant treasurer of Lea River Lines, Inc. and secretary of M. V. Shuttler, Inc. (173a, 174a, 94a). The refusal of the recipient of the service to identify herself should militate against the defendant's attempt to evade process.

In *Roth v. W. T. Cowan, Inc.*, 97 F. Supp. 675 (E. D. N. Y., 1951), the court reached through a deliberate evasion on the part of an individual of service of process in order to uphold service. The court refused to permit a refusal to identify oneself to prevent service that would have otherwise been effectuated (at page 677).

In the instant case, had the person identified herself, there could be no ambiguity as to whether it was Miss Bandos. Having created the ambiguity by their evasiveness, the defendants should not thus be served with a shield.[3] In *Roth v. W. T. Cowan, Inc., supra,* the court placed great weight on the fact that after a short interval, regardless of the dispute over the identity, the additional defendant in

3. This same evasive action continued as to subpoenas served at the time of trial when the offices housing Transportation Management Service, Inc., and the other satellite business organizations were decimated and denuded in order to avoid service of subpoenas (306a et seq.).

that case did have the papers in his possession. In the instant case, the prompt appearance by counsel clearly indicates that delivery was made to the proper parties.

The whole purpose of setting forth the procedure by which a corporation may be served is to accord it proper notice, provided it has sufficient presence in the geographical juirsdiction of the court. In *Koninklijke Luchtvaart Maat v. Curtiss-Wright Corp.*, 17 F. R. D. 49, the court said:

> "The defendant's attempt to negate process under the facts here presented would be tantamount to an evasion of process. Moreover, to countenance this attempt would contravene the basic concepts of the Federal Rules of Civil Procedure that technicalities should be reduced to a minimum and that all cases should be decided on their merits as expeditiously as possible. Thus, Rule 1 of the Rules of Civil Procedure counsels that the Rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action." (at page 51)

In the instant case, therefore, the delivery of the summons and complaint to the one in charge of the office of Transportation Management Service, Inc. was an effective service upon the corporations of which the person holding that office was an officer,[4] namely, M. V. Shuttler, Inc., and Lea River Lines, Inc. The person holding these titles was Miss Bandos. Absent a showing by the defendants that someone else had usurped this office and masqueraded as

4. "It will be noted that such rule requires only that he to whom the copy of the summons and of the complaint is delivered be an officer of the defendant corporation. It does not, as statutes sometimes do, erect a descending scale of officers with a requirement that to support the validity of service by delivery of the copy of process to one low in the scale, the availability of those higher than its recipient be negatived." *United States v. Central States Theatre Corporation*, 187 F. Supp. 114, 142 (1960).

the person in charge of the office of Transportation Management Service, Inc., the only fair inference to be drawn is that the summons and complaint were served upon Miss Bandos. Certainly the prompt appearance by counsel, albeit special, belies any failure of delivery.

The trial court, in setting aside service on M. V. Shuttler, Inc., and Lea River Lines, Inc., loses sight of the fact that the woman served, if she was in fact not Miss Bandos, would have been working under the direct direction and control of Miss Bandos, and Miss Bandos would therefore be estopped to deny that she was so served by permitting someone to usurp her title and function, if in fact this was done.

The trial court placed too much stress on the ceremonial aspect of service rather than its "notice" effect.

In summary, it is submitted that service was made upon Felicia L. Bandos, an officer of M. V. Shuttler, Inc., and Lea River Lines, Inc., or someone who refused to identify herself and purported to be one in Miss Bandos' position. Under these circumstances, Miss Bandos is estopped to deny that she received the papers, nor has she at any time ever denied that she received these papers or was the one so served. It is noteworthy that in her affidavit (26a), she does not deny nor has she at any time denied that she was the person served.

II.

Service was properly effectuated on M. V. Shuttler, Inc. and Lea River Lines, Inc. by serving Transportation Management Service, Inc., a related Corporation when all the named corporations were present and doing business at the same address within the jurisdiction.

Transportation Management Service, Inc., was a proper agent for M. V. Shuttler, Inc., and Lea River Lines,

Inc. The deposition of E. W. Graver, president of Transportation Management Service, Inc., clearly indicated that all the directions of M. V. Shuttler, Inc., came from the offices at 1813 Ranstead Street, Philadelphia, Pennsylvania, which was the real office and nerve center of the transportation complex. While both Lea River Lines, Inc., and M. V. Shuttler, Inc., had Wilmington, Delaware, addresses, it was admitted that these were paper addresses with no actual employees at those locations. Mr. Graver admitted that the movements of the "Shuttler" came from his office (63a). The securing of business for M. V. Shuttler, Inc., devolved upon Lea River Lines, Inc., and Transportation Management Service, Inc., out of the office at 1813 Ranstead Street, Philadelphia, Pennsylvania (66a, 67a). All instructions from the shipper to M. V. Shuttler, Inc., came through Transportation Management Service, Inc. These directions were explicitly obeyed by the vessel and by the ostensible president of M. V. Shuttler, Inc. (68a). All billings and payrolls were computed and issued from 1813 Ranstead Street, Philadelphia, Pennsylvania. All purchases were paid from 1813 Ranstead Street, Philadelphia, Pennsylvania. The teletype communications were centered at Transportation Management Service, Inc., at 1813 Ranstead Street, Philadelphia, Pennsylvania.

The trial court erred in its opinion that there had been no explicit designation of Transportation Management Service, Inc., as an agent for service. It is submitted that the very act of placing an officer of Transportation Management Service, Inc., as officers also of these respective companies was in itself a designation of Transportation Management Service, Inc., as a proper agent for service.

However, apart from any explicit designation, the court permits a designation to be found by conduct, circumstances and implication and in order to achieve a necessary result.

The instant case is much similar to *Remington Rand, Inc. v. Knapp-Monarch Company,* 139 F. Supp. 613 (E. D. Pa. 1956), where the defendant therein, while neither incorporated in Pennsylvania nor licensed to do business there was undoubtedly doing business there. The court is faced with the test problem of determining whether the degree of activity is such that a particular district becomes a proper locality in which to compel a foreign corporation to initially defend. Once the activity of the defendant was found to be sufficient so as to make it amenable to suit, then the court held that service of process upon a responsible party in charge of any substantial phase of that activity is sufficient for effective service of process. The court went on to say:

> "This result is necessary or else a foreign corporation with a multitude of activities of equal rank and importance within any particular district could evade service of process by the simple expedient of being careful to place no one in general charge of all the activity. Such an untenable result would be directly contra to the directive contained in Rule 1 of the Federal Rules of Civil Procedure which provides that the Rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

In the instant case all the key activities of M. V. Shuttler, Inc., and Lea River Lines, Inc., took place and were directed from the offices of Transportation Management Service, Inc., 1813 Ranstead Street, Philadelphia, Pennsylvania. A substantial activity was directly engaged in by Transportation Management Service, Inc., namely, the actual direction of the vessels, the solicitation of business, payment of all bills, filing of reports, documentations, financing and payrolls. See also: *Raul International Corp.*

v. Nu-Era Gear Corp., 5 FR Serv 2d 4d.352, Case 1; 28 FRD 368 (DCSDNY, 1961); *A. Del Sesto v. Trans World Airlines, Inc.*, 5 FR Serv 2d 4d.352, Case 2; 201 F. Supp. 879 (DCDRI, 1962); *American Football League v. National Football League*, 4 FR Serv 2d 4d.352, Case 1; 27 FRD 264 (DCD Md, 1967); *Jaftex Corporation v. Randolph Mills, Inc.*, 282 F. 2d 508 (1960).

In this regard it should be noted that both the motion to vacate and the affidavit in support thereof were palpably false. In the motion to vacate, it was denied that there was any officer of M. V. Shuttler, Inc., or Lea River Lines, Inc., within this jurisdiction. This was a blatent falsehood, yet the court completely ignored this. In addition, it was also blatently false that M. V. Shuttler, Inc., and Lea River Lines, Inc., were not doing business in this area. This too, the court chose to ignore.

B. The Denial of Discovery as to the Material Facts Relating to the Overall Complex of Which the Defendants Herein Were Tentacles as Subsequently Revealed at the Trial, Was Prejudicial in That It Contributed to the Vacation of Service.

Prior to the determination of the issues as to whether service was properly made upon M. V. Shuttler, Inc. and Lea River Lines, Inc., the trial Court precluded any discovery as to the ownership and control of the various defendants named herein. The very facts which were proved at trial that M. V. Shuttler, Inc. and Lea River Lines, Inc. and Transportation Management Service, Inc. are in fact tentacles of the Leaman Complex, were not before the Court when the issue of service was argued and decided. It is difficult to understand why the Court precluded this discovery. Certainly, it had bearing upon the activity of the Defendants, M. V. Shuttler, Inc. and Lea River Lines, Inc.

in this jurisdiction and the crucial part played by Transportation Management Service, Inc. as the control center or at best, a brother tentacle of the corporate octopus. Discovery as to the relationship which was found after the trial on the merits was material and within the liberal range of the discovery rules. *Conley v. Gibson*, 355 U. S. 41, 47-48; 2 L. Ed. 2d, 80, 85 (1957); *Hickman v. Taylor*, 329 U. S. 495, 91 L. Ed. 451 (1947). It cannot be lost sight of that this was an action brought under the *Jones Act*, 46 U. S. C. A. 688. Discovery of facts which are crucial to the establishment of service necessarily falls within the requirements of the Act, the legislative history of which discloses Congressional intent that it should be construed liberally. *Wilkes v. Mississippi River Sand and Gravel Co.*, 202 F. 2d 383, 387 (C. A. 6, 1953).

CONCLUSION.

A Seaman (albeit the female variety) stands deprived of her day in Court by a rigid and formalistic application of the Federal rules of civil procedure as to service upon the defendant corporation most concerned. The exercise of rigid formalism instead of pragmatic principles was rejected by this Court in *Provident Bank and Trust Co. v. Patterson*, 390 U. S. 102, 19 L. Ed. 2d 936. A defendant corporation who falsely denies the presence of its officers in the jurisdiction nevertheless stands to reap a windfall. The fact that the Defendant corporations had full and prompt notice is completely lost sight of in the technical maze as to who was actually served, a question that would never have arisen had the person so served properly identified herself. A liberal construction of the Jones Act, 46 U. S. C. A. 688 in accord with legislative intent is an empty boon unless the Federal rules of civil procedure which apply to that action are accorded the same liberal construction.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A.

Opinion of United States Court of Appeals for the Third Circuit.

(Filed June 19, 1968)

Argued September 15, 1967.

Reargued May 20, 1968.

Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

PER CURIAM.

This appeal arises out of civil and admiralty actions brought by Mabel Whayne against M. C. Shuttler, Inc., Lea River Lines, Inc., and Transportation Management Service, Inc. Plaintiff-libellant appeals from orders of the district court vacating service as to M. V. Shuttler, Inc., and Lea River Lines, Inc., and dismissing with prejudice the actions against Transportation Management Service, Inc.

We have carefully reviewed the entire record in this matter and we can find no error. Accordingly, the orders of the district court will be affirmed.

Judgment of the United States Court of Appeals for the Third Circuit.

Present: McLaughlin, Kalodner and Staley, *Circuit Judges.*

This cause came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and was reargued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 11, 1966 be, and the same is hereby affirmed, with costs.

June 19, 1968.

APPENDIX B.

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

February 11, 1966.

VAN DUSEN, *J.*

The above two actions were consolidated and tried to the court on December 6-7, 1965. As shown by paragraph 3 of the Report of the Pre-Trial Conference held 12/2/65 (Document 33),[1] the issues presented for trial on December 6 were plaintiff-libellant's (hereinafter referred to as plaintiff) contention that defendant-respondent (hereinafter called defendant) operated, managed and controlled the activities in which the M. V. "Shuttler" was engaged at the time of the collision and that it was part of a transportation complex, of which the owner of the above vessel was an integral member. At the conclusion of the trial on December 7, counsel agreed to take depositions of certain witnesses to supplement the record made at the trial and these depositions are contained in Document 37.

The issue for decision now before the court is defendant's Motion to Dismiss at the Close of Plaintiff's Evidence (Document 36).[2] The plaintiff is a woman who was employed as a cook aboard the M. V. "Shuttler" (hereinafter "Shuttler"), a vessel used in towing river barges. The

1. All document numbers refer to those assigned in Civil Action 25891.

2. This Motion is made in accordance with F.R.Civ.P. 41, which provides:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

plaintiff alleges that on April 19, 1957, she was injured in the course of her employment when the "Shuttler" collided with a barge in the Monongahela River while en route from McKeesport, Pennsylvania, to Clairton, Pennsylvania. The plaintiff charged that the cause of her injuries was the unseaworthy condition and negligent operation of the "Shuttler" and brought these two actions, one in admiralty and one under the Jones Act. The trial has commenced with Transportation Management Service, Inc. alleging initially that it neither managed nor controlled M. V. Shuttler, Inc. to such an extent as to impose tort liability on itself under principles of respondeat superior.

Plaintiff contends that M. V. Shuttler, Inc. was so completely controlled by Transportation Management Service, Inc. that the former must be considered the agent of the latter, in which case Transportation Management Service, Inc. would have to answer for tortious conduct committed by M. V. Shuttler, Inc. or, in the alternative, that both corporations were part of a single, unitary enterprise controlled by the Leaman Estate so that their corporate entities should be disregarded.

In 1957, M. V. Shuttler, Inc. was the owner of record of the vessel "Shuttler," which was the corporation's principal asset.[3] The officers and directors of the corporation in 1957 were John J. Fetsko, Elizabeth Fetsko, and Felicia L. Bandos.[4] John J. Fetsko, a resident of Florence, Alabama, was the sole stockholder of M. V. Shuttler, Inc.,[5] and was closely connected with the operation of the vessel. The

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3. Miss Bandos testified in a deposition that the "Shuttler" was the corporation's only asset (Document 19, p. 7).

The corporation's office at 716 Tatnall Street, Wilmington, Del., was a ghost office maintained and run by a so-called "corporation service," which forwards mail to any office designated by the corporation. Document 37, p. 4; Document 19, p. 14.

4. Document 19, p. 4.

5. Testimony of Emerson W. Graver, see notes of the court reporter.

plaintiff, herself, testified that on several occasions Mr. Fetsko came aboard at McKeesport and Pittsburgh, Pa., and gave orders to the vessel's engineer.[6] The testimony of Mr. Graver was that Mr. Fetsko was often aboard the "Shuttler" and may have acted as that vessel's engineer during certain periods.

The "Shuttler" was built without any "risk capital" by the Sturgeon Bay Shipbuilding and Dry Dock Company, and the Bank of Sturgeon Bay, which took a ship's mortgage on the vessel.[7] After completion sometime in 1956, "Shuttler" was engaged in towing barges on the Upper Ohio, Allegheny, and Monongahela Rivers, but not on the Mississippi.[8]

Most of the time "Shuttler" hauled barges for Lea River Lines, Inc. and Indian River Lines, Inc.,[9] but occasionally did hauling for other companies.[10]

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6. Testimony of Mabel Whayne, see notes of court reporter; also, Document 38, p. 1.

7. Testimony given at the trial by Emerson W. Graver. The plaintiff urges that the reason that no risk capital was needed to build the "Shuttler" was that the C. S. Leaman interest, which owned two large river boat companies, Indian River Lines, Inc. and Lea River Lines, tacitly backed the venture from the outset, but there is little or no evidence to support this. C. S. Leaman himself died on December 13, 1955, before the "Shuttler" was built and subsequently C. E. Fernald held the controlling interest in Lea River Lines and Indian River Lines, as executor of his estate (testimony given at the trial by Emerson W. Graver and Rea Eastwood). The defendant's position is that "Shuttler" was built without risk capital because John Fetsko was a man of means and well known in the industry (testimony given at the trial by Emerson W. Graver).

8. Testimony given at the trial by Emerson W. Graver.

9. Document 37, p. 31.

10. "Shuttler" hauled barges for Ashland Oil Company and may have hauled for other companies. Document 37, p. 31. It should be noted that when Emerson W. Graver was examined on this subject he testified: "I might be able to name companies for whom they ["Shuttler"] did towing. Of course you also have to remember that there might be something like ten or twelve thousand barges on the river. I would say Ashland Oil and possibly Ohio River Company." (Document 37, p. 31).

The company that handled the paper work for M. V. Shuttler, Inc. was Transportation Management Service, Inc. (hereinafter "TMS") located at 1813 Ranstead Street, Philadelphia, Pa. TMS performed a variety of services for M. V. Shuttler, Inc., including bookkeeping,[11] preparation of tax returns,[12] maintenance of the minute book of the corporation,[13] payment of bills,[14] preparation of government licensing forms,[15] and preparation of the "Shuttler" payroll under specific instructions from Mr. John Fetsko.[16] TMS also furnished bookkeeping and similar services to companies completely independent of those corporations in which the Leaman estate had any financial interest, such as Boyer Brothers of Allentown, a plant in Frankford, the Ace Manufacturing Company and Machine Shop, Marine Transportation Company, the Pennsylvania Meat Packers Association, etc.

But TMS did not solicit business,[17] advertise,[18] sign purchase orders,[19] or do any buying[20] for M. V. Shuttler, Inc. Furthermore, the testimony of both Mr. Graver and Miss Bandos indicates that the movement of the "Shuttler" was in no way directed by TMS, although the offices of TMS were apparently used to transmit teletype messages from Lea River Lines, Indian River Lines, or some other company that might want to employ the "Shuttler" for hauling

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11. Testimony of Emerson W. Graver, see notes of court reporter.

12. Document 19, p. 12 (deposition of Felicia L. Bandos taken November 17, 1959, and placed in evidence at page 25 of Document 37).

13. Document 19, p. 12.

14. Document 19, p. 13.

15. Document 19, p. 20.

16. Document 19, p. 21.

17. Document 19, p. 19.

18. Document 19, p. 19.

19. Document 19, p. 14.

20. Document 19, p. 14.

barges.[21] There was no testimony that TMS ever initiated these teletype messages, but only that TMS acted as a conduit for messages initiated by others.

In 1957, at the time of the accident, the directors and officers of M. V. Shuttler, Inc. were John Fetsko (President), Elizabeth Fetsko (Vice President), and Felicia Bandos (Secretary-Treasurer). The directors and officers of TMS at that time were Emerson Graver (President), Thomas Pepper (Vice President) and Felicia Bandos (Secretary-Treasurer).[22]

The sole stockholder of M. V. Shuttler, Inc. in 1957 was John Fetsko and all the stock of TMS at that time was owned by Rea Eastwood and Mrs. G. M. Fernald.[23] Thus, the only formal link between the two corporations was Felicia Bandos, who was a director and officer of both.

At the time of the plaintiff's accident, the captain on board the "Shuttler" was John P. Morris.[24] Captain Morris was responsible for rehiring[25] the plaintiff and was her immediate superior during the times she was employed aboard the vessel. The record discloses that the management and control of the vessel was exercised by Captain Morris and John Fetsko[26] and, although they in turn may

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21. Document 19, pp. 22-24.

22. Document 19, pp. 3-5.

23. Document 38, p. 3. Mrs. G. M. Fernald is the wife of Mr. C. E. Fernald; see footnote 7.

24. Document 37, pp. 5-6.

25. The plaintiff was originally hired by John Fuller (Vice President of Lea River Lines) and sent to McKeesport, Pa. to join the "Shuttler" in August of 1956. Plaintiff subsequently left the "Shuttler" in January of 1957, when the wife of Captain Morris took over the position of cook on the vessel. In March of 1957, the plaintiff was rehired by Captain Morris and was continuously on board up until the accident, which was April 19, 1957.

26. John Fetsko also signed checks for M. V. Shuttler, Inc. (Document 37, pp. 22-23; Document 19, p. 13), forwarded bills (Document 19, p. 14), did the buying for the "Shuttler," and furnished information from which the payroll sheets were composed (Document 19, p. 21).

have often acted in accordance with teletype messages which passed through the office of TMS, there is nothing in the record that would indicate that the "Shuttler" could move only on receipt of such teletype messages or that TMS did anything more than transmit these teletype messages originally coming from third parties.

[1, 2] It is noted that TMS was never the record owner of the "Shuttler." That vessel was owned by M. V. Shuttler, Inc., a corporation in its own right,[27] all of whose stock was owned by John Fetsko. But the plaintiff contends that M. V. Shuttler, Inc. was so directly controlled by the "Leaman Complex," of which TMS was the dominant corporation, that TMS should be held liable here.[28]

[3, 4] First, the undersigned finds that there is insufficient evidence on this record to support a finding that TMS was the dominant corporation of the "Leaman Complex" and, therefore, the plaintiff must establish that M. V. Shuttler, Inc. was the "mere instrumentality" of TMS in order to hold TMS liable. Steven v. Roscoe Turner Aeronautical Corporation, 324 F. 2d 157, 160 (7th Cir. 1963). This the plaintiff has failed to do.

[5] Ordinarily, common directors and officers and stock control are prerequisites for the application of the "instrumentality rule." Steven v. Roscoe Turner Aeronautical Corporation, supra, at page 161. Although in the present

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27. The plaintiff has alleged that M. V. Shuttler, Inc. did not at all times strictly adhere to the formal legal requirements demanded of a corporation. The burden of showing such failure to comply with legal requirements is on the party attacking the propriety of corporate action (see Fletcher on Corporations, §§ 4592, 433, 2010). The undersigned finds that the plaintiff has not met this burden.

28. Even accepting the plaintiff's analogy which described the "Leaman Complex" as an octopus and M. V. Shuttler a tentacle, it has not been shown that TMS was the "brain." The court suggests that TMS may have been only another tentacle.

case one officer and director, Felicia L. Bandos, was common to both companies, TMS did not control any of the stock of M. V. Shuttler, Inc.

[6] But even assuming that the instrumentality rule applies in the present case, the plaintiff has failed to meet the test set forth with great clarity in Steven v. Roscoe Turner Aeronautical Corporation, supra, at page 160. The plaintiff must prove three elements: (1) that the parent controls the subsidiary to such a degree that the subsidiary is a mere instrumentality; (2) that the parent is perpetrating fraud or wrong through its subsidiary (e.g., torts, violation of a statute, or stripping the subsidiary of its assets); and (3) an unjust loss or injury to the claimant, such as insolvency of the subsidiary.

[7] In determining the first of these three elements, the courts weigh many factors. Cf. Steven v. Roscoe Turner Aeronautical Corporation, supra, at page 161, and Miller v. Bethlehem Steel Corporation, 189 F. Supp. 916, 917 (S. D. W. Va. 1960). In the latter case, the court pointed out that it was not the opportunity to control, but the actual control which was determinative of the issue of liability.

[8] The factors in this case which are controlling are as follows:

1. TMS owned no stock in M. V. Shuttler, Inc. and M. V. Shuttler, Inc. owned no stock in TMS.

2. TMS and M. V. Shuttler, Inc. had only one director and officer common to both companies, Felicia L. Bandos.

3. M. V. Shuttler, Inc. regularly paid TMS for the bookkeeping and other services that TMS performed.

4. Directors' meetings of TMS and M. V. Shuttler, Inc. were held at different times and in different places.

5. The formal legal requirements of both companies were maintained at all times.

6. TMS did not direct the movement of the vessel "Shuttler."

7. TMS did not purchase any equipment or supplies used on board the "Shuttler."

8. TMS did not finance the building of the "Shuttler."

9. TMS did not hire or fire the personnel on board the "Shuttler."

10. TMS did not treat the "Shuttler" as its own.

Since the plaintiff has failed to prove the first of the three elements essential to the instrumentality rule, it is unnecessary to discuss the other two elements.

It is conceivable that the Leaman Estate might be liable here as the dominant force behind the "Leaman Complex."[29] But the Leaman Estate is not a party to this action and there is certainly not enough evidence on this record to support a finding that it controlled M. V. Shuttler, Inc.

Since the plaintiff has failed to prove the contention that this defendant-respondent, TMS, is responsible for the damages claimed in the Complaint and Libel, both actions must be dismissed. Although it is always unfortunate when

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29. There were numerous overlapping and interlocking directors and officers in the "Leaman Complex." Rea Eastwood was a stockholder in TMS (50%), a director and the President of Lea River Lines and Indian River Lines, Inc. John Fuller was President of Marine Supply Co. and Vice President of Lea River Lines and Indian River Lines. Thomas Pepper was Vice President of TMS, Assistant Secretary of Lea River Lines and Indian River Lines, and Vice President of Marine Supply Co. C. E. Fernald was the executor of the Estate of C. S. Leaman, which controlled the stock of Lea River Lines and Indian River Lines. Mrs. C. E. Fernald owned 50% of the stock of TMS. Felicia Bandos was Secretary-Treasurer and a director of TMS and M. V. Shuttler, Inc.

an action has to be dismissed because instituted against a defendant-respondent which was not responsible for the alleged tort, this is not the only case where such a situation has arisen in this court. Cf., for example, Sanders, Administratrix, etc. v. Venite of Philadelphia, Inc. et al., D. C., 39 F. R. D. 55, Opinion and Order of 12/22/65; Harter v. Lestoil, Inc., Civil Action 29236, Verdict and Judgment of 1/27/66.

ORDER.

And Now, February 11, 1966, after consideration of the entire record in this case, including the depositions taken on December 8, 1965 (Document 37), hearings on December 6 and 7, 1965, and the briefs of counsel (Documents 38 and 40), It Is Ordered that the defendant's motion to dismiss made at the close of plaintiff's evidence (Document 36) is granted and the actions are dismissed with prejudice.